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Supreme Court Of The United States

October Term 1968

No. 1271

KENNETH H. DOLLERIS, Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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SUPREME COURT OF THE UNITED STATES

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No._____

KENNETH H. DOLLERIS, *Petitioner*

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Kenneth H. Dolleris, by his counsel, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, affirming the judgment of the United States District Court for the Western District of Kentucky.

OPINIONS BELOW

The District Court filed no opinion. The Opinion of the Court of Appeals (Pages 1a-9a this Petition) is not yet reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 20, 1969 (added transcript to Volume II of

the pleadings). An order staying the mandate of the Court of Appeals thirty (30) days from April 8, 1969 was entered on April 8, 1969 (R. ____). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

QUESTIONS PRESENTED

1. Was petitioner's privilege to remain silent denied by the admission of B. Morgan's testimony for the government which informed the jury that petitioner did not talk to the revenue agents about this case after special agent McLellan warned petitioner of his constitutional right to remain silent on October 18, 1965, and by the trial court's instructions on that right to the jury?

2. Was petitioner denied a fair trial by the judgment of guilty which is not supported by any evidence that tends to prove petitioner guilty?

CONSTITUTION AND STATUTES INVOLVED

Amendments to the Constitution.

"Art. V.—No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia when in actual service, in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case, to be witness against himself, nor be deprived of life, liberty, or property, with-

out due process of law; nor shall private property be taken for public use without just compensation."

26 United States Code Section 7201.

"Sec. 7201. Attempt to Evade or Defeat Tax.

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

26 United States Code Section 7206 (1).

"Sec. 7206. Fraud and False Statements.

"Any person who—

"(1) Declaration under penalties of perjury—Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; * * * shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

26 United State Code Section 7608 (b) (1) and (2) (A) (B).

"Sec. 7608 * * * (b) Enforcement of Laws

Relating to Internal Revenue other than subtitle E.—

"(1) Any criminal investigator of the Intelligence Division or of the Internal Security Division of the Internal Revenue Service whom the Secretary or his delegate charges with the duty of enforcing any of the criminal provisions of the internal revenue laws or any other criminal provisions of law relating to internal revenue for the enforcement of which the Secretary or his delegate is responsible is, in the performance of his duties, authorized to perform the functions described in paragraph (2).

"(2) The functions authorized under this subsection to be performed by an officer referred to in paragraph (1) are—

"(A) to execute and serve search warrants and arrest warrants, and serve subpoenas and summonses issued under authority of the United States;

"(B) to make arrests without warrant for any offense against the United States relating to the internal revenue laws committed in his presence, or for any felony cognizable under such laws if he has reasonable grounds to believe that the person to be arrested has committed or is committing any such felony;"

STATEMENT

The indictment as specified by the Bill of Particulars (R. 5a, 19a), charged that petitioner omitted to

report for taxes $43,550.50 which he received from two of his corporation's customers, Louisville Scrap Material Company and Brodey and Brodey, Inc. of Indianapolis, Indiana, during the taxable years January 31, 1961, through January 31, 1965.

Government produced evidence that petitioner received $48,007.50 in currency in payment of thirty-six cash sales of scrap metal which he made to his corporation's two customers. (Gov. Exh. 32, 33).

Petitioner produced his corporation's Cash Receipts Journal (of D. & W. Sales & Service, Inc.) from which Mr. Robert Button testified and recited twenty-six entries in the journal recording the receipt of $51,286.51 in currency from cash sales which were made during the period involved. (Defendant's Exhibits 3 and 4, App. 299-301).

Mr. Durbin Oldham, who prepared the tax returns, testified for the government and stated that the amounts of all entries made in the Journal were reported in the tax returns. (R. 84, 76a).

Petitioner's company had only two products for sale, (1) finished auto parts, and (2) scrap metal. All auto parts were sold to customers on credit accounts except occasional sales were made for checks payable to the corporation. None were made for currency. All sales of scrap metal were cash sales payable in currency (two checks were payable to cash) or by check payable to the corporation. (R. 322-338, 237a-241a).

No evidence was produced that any cash sales of scrap were made for currency to any person or firm

other than to Louisville Scrap Material Company or to Brodey and Brodey. No evidence was produced that auto parts were sold for currency. Consequently, Mr. B. Morgan for the government, Mr. Durbin Oldham for the government, and Mr. Robert Button for petitioner, each testified that he could not say that the government's figure of $48,007.50 was not included in the petitioner's figure of $51,286.51.

During petitioner's trial, revenue agent, B. Morgan, for the government, was permitted to testify:

1(a) Revenue agent B. Morgan and special agent McLellan held a conference with petitioner and with petitioner's counsel Lee S. Jones on October 18, 1965.

(b) Special agent McLellan warned petitioner that under the Constitution he had the right to refuse to answer any question which he thought might incriminate him. (R. 250-188a).

(c) Petitioner's counsel thereupon advised petitioner not to answer any questions because they might be used against him. (R. 249, 188a).

(d) B. Morgan recited the questions asked and the answers given in this conference to inform the jury that petitioner's counsel answered all the questions and to make clear to the jury that petitioner remained silent after he was warned and advised of his right to remain silent. (R. 250-253, 188a-190a).

2(a) A conference was held on October 27, 1965, and special agent McLellan, B. Morgan, and petitioner's counsel were present. (R. 250-253, 188a-199a).

(b) B. Morgan recited to the jury that this case

was discussed by the three persons who were present which made clear to the jury that the agents had offered the petitioner an opportunity to talk to them about this case, but that he declined to do so. (R. 253-255, 190a-191a).

3(a) A conference was held on May 3, 1966, and special agent McLellan, B. Morgan, and petitioner's counsel were present and the three persons discussed this case.

4(a) A conference was held on September 15, 1966, and special agent McLellan, B. Morgan, Mr. Cecil, Intelligence Division group supervisor, and petitioner's counsel were present. (R. 258, 193a).

(b) Mr. Morgan testified:

> "A Well, on September 15, 1966, Mr. Jones came to the office of the Intelligence Division for a conference with Mr. Cecil, who is Intelligence Division Group Supervisor, and Mr. McLellan and myself.
>
> "Q Mr. Dolleris invited?
>
> "By the Court: Was—was Mr. Dolleris there?
>
> "A No.
>
> "Q Was he invited?
>
> "A He was invited, but he did not come." (R. 258, 193a).

(Court adjourned).

(Court convened).

> "Q Now, Mr. Morgan, I'd like to direct your attention to the meeting of September the 15th, 1966. "Now, if you would, tell us once again who was present at that meeting?

"A At that meeting, Mr. Cecil, Intelligence Division Group Supervisor—

"Q (Interrupting) Is this the gentleman seated at counsel table here (Indicating Mr. Cecil)?

"A Yes, it is. Mr. McLellan, Special Agent, Mr. Jones and myself.

"Q Now, was Mr. Dolleris asked to come to this meeting?

"A Yes, he was invited to the meeting, but he did not appear.

"Q At this meeting was Mr. Jones advised that a recommendation for prosecution was being considered?

"A Yes, he was. * * *" (R. 261-262, 195a-196a). Before the Court in Chambers).

"Mr. Smith: Of course, Judge, one—in the light of this next statement that I want to tell you, it becomes very important. Whenever Mr. Jones was with Mr. Dolleris, Mr. Jones, as he's entitled to, instructed Mr. Dolleris not to talk to us. So you can't investigate somebody and just carry on a one-sided conversation." (R. 272, 202a-203a).

Mrs. Ailene Gourley for the government testified:

"Q Okay. Now, who is your attorney?

"A Well, Mr. Jones is representing the company.

"Q He represents you, too, I assume?

"A Yes, sir.

"Q Were you advised not to talk to the agents by Mr. Jones?

"Mr. Jones: Your Honor, we've got a witness

here to—Your Honor, we have a witness who is on the stand, and the question has been asked—

"By the Court: (Interrupting) What question?

"Mr. Smith: I asked her was she advised not to talk to these agents by Mr. Jones.

"Mr. Jones: My point, she's here to answer—

"By the Court: (Interrupting) Well, she can answer then.

"Mr. Jones: All right, sir.

"The Witness: Was I advised not to?

"Q Yes, ma'am.

"A Yes, sir." (R. 234, 177a).

The Trial Court instructed the jury at the close of the case as follows:

> "One other thing, ladies and gentlemen, the fact that this defendant did not take the stand in his own defense is a circumstance that shall not be considered by you and you shall not discuss it even in your deliberations in the jury room." (R. 399, 290a).

REASONS FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the Fifth Amendment of the Constitution of the United States.

Government presented to the jury a dialogue between the prosecutor and the witness, B. Morgan, which informed the jury that a pretrial event occurred in this case, and being the fact that the petitioner remained silent when B. Morgan, a revenue agent, and special agent McLellan confronted him to inquire

of criminal fraud and evasion of tax in this case on October 18, 1965. The witness informed the jury that special agent McLellan then warned the petitioner of his right to be silent, and also that his counsel advised him not to answer any questions of the agents and further that thereafter all questions of the agents were answered by petitioner's counsel.

In *Miranda* v. *Arizona*, 384 U.S. 436, 468; 16 L. Ed. 2d 694; 86 S. Ct. 1602, this Court said:

> "The prosecution may not, therefore, use at the trial the fact that he stood mute or claimed his privilege in the face of accusations." (Note 37).

The prosecution presented to the jury this evidence of what transpired in a series of conferences which the two revenue agents held for the purpose of hearing the petitioner talk about this case, beginning with the warning and advice in the first conference and continuing from one conference to the next one as repeated opportunities for the petitioner to talk to them. The witness expressed to the jury a duty on petitioner to talk about his case and emphasized the duty in the mind of the jury by using the word "invited" four times in testifying about the fourth conference which was held on September 15, 1966. (R. 258-262, 193a-196a). The Trial Court's question: "Was Mr. Dolleris there?" clearly had a forceful meaning to the jury. (R. 258, 194a).

The evidence of the prosecution's procedure and its resulting conclusion to recommend prosecution, after

the petitioner declined to talk, was an example for the jury to consider and to follow in rendering its verdict.

2. A writ of certiorari should be granted because obviously this testimony was planned and deliberately considered by the prosecution as its answer to the petitioner's remaining silent and as a method of turning the conduct of the petitioner in expressing his election to remain silent into evidence to induce the jury to convict him contrary to the Fifth Amendment of the Constitution of the United States.

Special agent McLellan was investigating this case under Mr. Cecil, who is Intelligence Division Group Supervisor. Internal Revenue Code Section 7608 (b) (2) (A) and (B) grants to him authority "(A) to execute and serve search warrants and arrest warrants, (B) to make arrests without warrant."

Petitioner was, therefore, under compulsion when facing the agents, Mr. Morgan and Mr. McLellan on October 18, 1965, to talk or rely on his privilege to remain silent, and further he was under compulsion to talk or to decline to attend when three conferences were held later.

3. A writ of certiorari should be granted because the prosecution has now developed in this case an easy and practical method to take the right against self-incrimination from anyone accused of an attempt to evade tax. It is reasonable to anticipate a frequent use of this method if permitted to do so.

4. A writ of certiorari should be granted because the Opinion of the Court of Appeals imposes two new

limitations on the right to remain silent. The first is, that the testimony was not deliberately illicited, and the second is, that the petitioner cooperated with the agents after he had received advice to stand mute. (Opinion, page 3).

5. A writ of certiorari should be granted because the Trial Court commented to the jury on petitioner's failure to testify in his trial. This comment was an instruction to the jury:

> "One other thing ladies and gentlemen, the fact that this defendant did not take the stand in his own defense is a circumstance that shall not be considered by you and you shall not discuss it even in your deliberations in the jury." (R. 399, 290a).

This action of the Trial Court is in conflict with the Fifth Amendment of the Constitution of the United States.

Petitioner did not request an instruction on this fact. When the Trial Court inquired within hearing of the jury for objections to the charge, petitioner's counsel answered within hearing of the jury, "None, Your Honor." (R. 400, 291a).

This comment is in conflict with petitioner's right to stand mute, and to due process under the Fifth Amendment of the Constitution of the United States *Chapman* v. *State of California,* 386 U.S. 18; 87 S. Ct. 824; 17 L. Ed. 2d 805; *Griffin* v. *State of California,* 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106.

6. The writ of certiorari should be granted because the petitioner has not received a fair trial by reason of a lack of any evidence in the record which tends to prove him guilty as charged in the indictment contrary to the due process clause of the Fifth Amendment of the Constitution of the United States.

Mr. B. Morgan is an internal revenue and certified public accountant. He testified for the government that he could not say that the items of currency which petitioner received from cash sales made to Louisville Scrap Material Company and Brodey and Brodey in the sum of $48,007.50 were not included in the $51,286.51 in currency receipts from cash sales as recorded in the Cash Receipts Journal and included in the tax returns. (R. 303, 224a).

Mr. Durbin Oldham is a certified public accountant, who prepared petitioner's books and prepared all of his tax returns during the years involved, testified for the government and concurred with the testimony of B. Morgan that he could not say that the government's figure of $48,007.50 in currency received from cash sales was not included in the petitioner's figure of $51,286.51 in currency receipts from cash sales as recorded in the Cash Receipts Journal and reported in the tax returns. (R. 84, 76a).

Mr. Robert A. Button is a certified public accountant and a former special agent of the Internal Revenue Service. He testified for the petitioner and he concurred with Mr. B. Morgan and Mr. Durbin Oldham that he could not say that the government's

figure of $48,007.51 was not included in the petitioner's figure of $51,286.51 and reported in the tax returns. (R. 351, 256a).

Petitioner's company sold finished auto parts on credit accounts to regular customers. It sold all scrap metal for cash, payable in currency, or by a check payable to cash or by a check payable to the company. The company sold no other products and made no sales of scrap metal to a person or firm other than Louisville Scrap Material Company and Brodey and Brodey during the years involved. (A very minor exception is an occasional cash sale at the front counter and not scrap metal.) Mr. Morgan could not identify an entry in the Cash Receipts Journal as being the record of a receipt of currency for the sale of anything other than scrap metal. (R. 304, 255a).

This is a controlling fact since the record shows sales of scrap metal only to Louisville Scrap Material Company and to Brodey and Brodey. There is no evidence that the Cash Receipts Journal is in error. Petitioner insists that the record is conclusive that the government did not prove him guilty as charged. The government did not produce evidence of a single cash sale of any product for currency to explain any items of the $51,286.51 which were recorded and reported in the tax returns. This burden was on the government to sustain the indictment.

The judgment of the Court of Appeals on this issue is contrary to the decisions in *Lockhart* v. *United States,* 183 F. 2d 265 (10th C. C. A.), *Canida* v. *United*

States, 250 F. 2d 822 (5th C. C. A.), and *United States* v. *Safur,* 251 F. 2d 30 (7th C. C. A.).

CONCLUSION

The questions raised in this petition are of great importance in preserving the full meaning of the Fifth Amendment of the Constitution of the United States. They are important in the correct administration of revenue provisions of 26 United States Code, Sections 7201, 7206(1), and 7608.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA - *Plaintiff-Appellee*

v.

KENNETH H. DOLLERIS - *Defendant-Appellant*

APPEAL FROM THE U. S. DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY

Decided March 20, 1969.

Before: O'SULLIVAN, EDWARDS, and MCCREE, Circuit Judges.

MCCREE, Circuit Judge. Appellant was convicted by a jury on all counts of a nineteen count indictment charging wilful evasion of income taxes by the filing of false tax returns and wilful signing of false returns, in violation of Sections 7201 and 7206 of the Internal Revenue Code of 1954.

He is the principal officer and majority stockholder of D. & W. Sales and Service, Inc., hereinafter referred to as "D. & W.", a corporation located in Louisville, Kentucky and engaged in rebuilding and selling used automobile parts. The indictment charged him with making certain sales of scrap materials to Brodey & Brodey, Inc., hereinafter referred to as "Brodey", a corporation located in Indianapolis, Indiana, and to Louisville Scrap Material Co., Inc.,

hereinafter, "Louisville Scrap Co.", a corporation also located in Louisville, and with deliberately failing to report a part or all of the proceeds of these sales. The amounts alleged to have been unreported total approximately $43,000. Counts 1-5 and 11-14 of the indictment concern the tax returns of D. & W. for the fiscal years ending on January 31, from 1961 to 1965. Counts 6-10 and 15-19 concern taxpayer's personal returns for the same years.

The first question presented on appeal is whether the District Court erred in receiving certain testimony which appellant contends conveyed to the jury the fact that appellant had asserted his right to remain silent during the investigation of his alleged tax evasion.[1] Although appellant cites several portions of testimony in support of this contention, he relies primarily on that of Internal Revenue Agent Bernard Morgan concerning a meeting attended by agents of the Internal Revenue Service, taxpayer and his attorney.[2]

---

[1] "The taxpayer's objection is that government related in testimony to the jury in a planned, subtle, adroit, skillful, effective, offensive, and running manner a dialogue between the prosecutor and the government witness Mr. Morgan to inform the Court and the jury that the taxpayer, on advice of his counsel, elected to exercise his right to remain silent. . . ." Appellant's Reply Brief at 2.

[2] Morgan testified as follows:

Q. All right. Now, did you meet them on or about October 18th, 1957?

A. Yes. At that time Agent McLellan, Special Agent McLellan, was with me and we met Mr. Dolleris and Mr. Jones in Mr. Dolleris' office at D & W.

Q. And what was the purpose of meeting with them?

A. To discuss the examination.

Q. Did you talk to Mr. Dolleris?

A. Yes. And Mr. Jones advised Mr. Dolleris not to answer questions because they might be used against him. And at that time Agent McLellan stated that under the Constitution Mr. Dolleris had the right to refuse to answer any questions that he thought might incriminate him.

Q. Was anything said about these scrap sales to Brodey & Brodey?

(Footnote continued on p. 3a.)

It is true that "[t]he prosecution may not . . . use at trial the fact that . . . [the defendant] stood mute or claimed his privilege in the face of accusation." *Miranda* v. *Arizona,* 384 U.S. 436, 468 (1966) (n. 37). *Accord, United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967); *United States* v. *Pearson,* 344 F.2d 430 (6th Cir. 1965). It is also clear that testimony which is elicited to establish that a defendant claimed the privilege against self-incrimination before a grand jury or at a former trial is inadmissible. *Grunewald* v. *United States,* 353 U.S. 391 (1957); *Stewart* v. *United States,* 366 U.S. 1 (1961). We do not think, however, that Morgan's testimony falls within the scope of these prohibitions. It was not deliberately elicited and conveyed only the fact that appellant's attorney had advised him of his constitutional right to remain silent. Moreover, other testimony which the jury heard, and which is discussed *infra,* reveals that appellant cooperated with the agents after he had received this advice, and that he authorized his attorney to participate in conferences with them in order to explain the apparent inaccuracy of his returns. The other testimony relied upon by taxpayer only remotely lends itself to the contention he advances and does not merit further discussion.

In any event, this issue is not properly before us on appeal. During this trial, appellant made specific objections to some of this testimony, but made no

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(Footnote continued from p. 2a.)

A. Yes. We discussed this — Jones said that scrap sold to Brodey was weighed at D & W and picked up there by a Brodey truck. He said that Dolleris might have helped weigh the scrap and he said that he had the list of transactions which I had given him on March 17th, but he had not determined the cause of the discrepancies. Record at 249-50.

objection at any time based on the constitutional grounds he now asserts. As this court stated in *United States* v. *Miller,* 316 F.2d 81 (6th Cir. 1963), *cert. denied,* 375 U.S. 935 (1963), *reh. denied,* 375 U.S. 989 (1964):

> The Supreme Court has held that an objection to evidence predicated upon a specific constitutional claim is not properly presented for review if the only objection made in the trial court was based on other grounds. *On Lee* v. *United States,* 343 U.S. 747, 749-50, n. 3, 72 S. Ct. 967, 96 L.Ed. 1270. Under such circumstances, the Court of Appeals may decline to consider the constitutional claim in the exercise of its discretion under Rule 52(b), F.R. Cr. P. 316 F.2d at 84.

Furthermore, even if receipt of this testimony were constitutional error and if, despite appellant's failure to make and appropriate objection to its receipt, we were disposed to consider this issue on appeal, we would hold that the error was harmless beyond a reasonable doubt. *Chapman* v. *California,* 386 U.S. 18 (1967), *reh. denied,* 386 U.S. 987 (1967).

The next question presented is whether statements made by Dolleris' attorney, Mr. Jones, during conferences held for the purpose of investigating the accuracy of appellant's returns were properly received by the District Court as admissions, even though Dolleris was not present at the conferences. Whether such statements constituted admissions by Dolleris depends on the scope of Jones' authority at the time they were made. *Laird* v. *Air Carrier Engine Service, Inc.,* 263 F.2d 948 (5th Cir. 1959). As appellant observes, an attorney, merely because of his employment in con-

nection with litigation, does not have the authority to make out-of-court admissions for his client, except those which are directly related to the management of that litigation. 7 Am. Jur. 2d, *Attorneys at Law* §122 (1963). However, on October 25, 1965, Dolleris executed a power of attorney[3] which provided in part:

> KNOW ALL MEN BY THESE PRESENTS:
>
> That I, Kenneth H. Dolleris, hereby make, constitute and appoint Lee S. Jones, my true and lawful attorney, hereby revoking any and all powers of attorney heretofore executed in the premises, for me and in my name, place and stead before the Internal Revenue Service, United States Treasury Department, to defend me against proposed income tax deficiency or income tax evasion or failure to file returns for all taxable years 1959, 1960, 1961, 1962, 1963, 1964, and 1965, to do and perform any and all other lawful acts as shall be deemed necessary or proper to protect my interest; to request of and receive from the Treasury Department such documents or copies thereof as I may be entitled under the law and the regulations; to demand and receive, giving and granting unto said attorney full power and authority to do and perform all and every act or thing whatsoever requisite or necessary in and about the premises as fully to all intents and purposes as I might or could do if personally present at the doing thereof; thereby ratifying and confirming all action my said attorney may have taken in this matter.

---

[3] This power was admitted into evidence as "Government Exhibit No. 31" and is set forth in Appendix B to Appellee's Brief at 28.

We hold that this instrument authorized Jones to participate in conferences with treasury agents and to attempt to explain to them the apparent inaccuracy of appellant's returns. Since the statements in question were made by Jones for this purpose, they were within the scope of his authority and testimony concerning them was properly admitted by the District Court.[4]

Any doubt about the intended legal effect of the power of attorney is dispelled by consideration of the circumstances under which it was executed and the subsequent acts of the parties. 3 Am. Jur. 2d, *Agency* § 33 (1962). Appellant was aware of the purpose for which the conferences were held and obviously knew that his refusal or failure to provide a satisfactory explanation of his returns would be likely to result in criminal prosecution. On March 17, 1965, he and Jones attended the first conference and he allowed Jones to answer many of the questions posed by the agents and to receive a list of allegedly unreported items. At a second conference held on October 18, 1965, he allowed Jones to respond to all questions asked by the agents. One week later he executed the power of attorney. Thereafter, Jones, unaccompanied by Dolleris, participated in four more conferences held during 1965 and 1966. One of these conferences was held in the D. & W. offices, and appellant was invited to attend at least one of these meetings but declined to do so.

In *Epstein* v. *United States,* 246 F.2d 563 (6th Cir. 1957), *cert. denied,* 355 U.S. 868 (1957), this

[4] Taxpayer moved to exclude all statements made by his attorney during conferences at which he was not present. The District Court, after taking this motion under submission, denied it in chambers. Appendix to Appellant's Brief at 294a. Since we are given no reason for this denial, we must assume that it was also for this reason.

court determined that two letters written by the appellant's accountant during an investigation of income tax evasion were admissible into evidence, stating:

> The contention that the court committed reversible error in permitting the admission of two letters signed by Eugene Bernstein in explanation of one of the charts [used by the government during the trial] has no merit. Bernstein was an accountant employed to represent defendant. During the course of the investigation he wrote one letter (dated February 3, 1955), on the letterhead of his accountant's firm, with reference to the holdings of defendant and his wife. He wrote a similar letter on the letterhead of defendant's attorneys in which his name is listed as tax counsel, giving similar information with reference to the transactions between defendant and The Jameson Construction Company. These statements from attorney and tax counsel are plainly competent. 246 F.2d at 570-71.

The third question presented on appeal is whether certain invoices and checks which Brodey made payable to nonexistent and fictitious parties were erroneously admitted into evidence by the District Court. Appellant required Brodey to pay cash for some of the scrap metal which it bought. In complying with this requirement, Brodey made out checks and invoices in the names of fictitious payees, cashed the checks, and delivered the proceeds to Dolleris. Brodey's secretary-treasurer, Harry Brodey, testified that it could have made out the checks (and presumably the invoices) to cash and have achieved the same result.[5]

In *Bodnar* v. *United States,* 248 F.2d 481 (6th Cir.

[5] Record at 173-74.

1957), checks made out to cash were offered to establish a taxpayer's receipt of certain unreported cash payments. We held them properly admissible as records made in the regular course of business under 28 U.S.C. § 1732 (1951). We find no reason to distinguish between checks payable to cash and checks payable to fictitious persons in the context of this case. The uncontradicted testimony of two of Brodey's officers shows that although the payees were fictitious, the transactions took place and Dolleris received the proceeds of the checks.[6]

Appellant's contention that the admission of these documents was error because of their tendency to associate him with a fraudulent scheme is also without merit. It is clear that this evidence was relevant because it was introduced to corroborate testimony that taxpayer, on many occasions, had asked for and received part of the sale price of scrap in cash. A trial judge has discretion to admit or refuse relevant evidence even though it may have a prejudicial effect on the jury. *United States* v. *Craft,* No. 1832 (6th Cir. Feb. 20, 1969). We do not think that there was an abuse of discretion in this case.

The fourth question presented is whether there is sufficient evidence in the record to support the jury verdict of guilty. Appellant points out that he moved for acquittal at the conclusion of the Government's case and that this motion was denied. After introducing evidence in his own behalf, appellant failed to renew this motion at the conclusion of the entire case or thereafter. As this court stated in *United States* v. *Gosser,* 339 F.2d 102 (6th Cir. 1964), *cert. denied,* 382 U.S. 819 (1965), *reh. denied,* 382 U.S. 922 (1965):

[6] Record at 164-232.

> It is the settled rule that if a defendant at the close of the Government's case moves for judgment of acquittal on the ground that the evidence is insufficient to support a verdict of guilty, and after the motion is overruled, introduces evidence in his own behalf, he waives his objections to the denial of his motion for judgment of acquittal on that ground. 339 F.2d at 110.

Despite this rule, however, we could take cognizance of the contention that the evidence was insufficient if the submission of the case to the jury constituted plain error under Rule 52(b), FED. R. CRIM. P.

In this regard, appellant points out that if the cash receipts from scrap sales were included in D. & W.'s recorded cash receipts or were even though unrecorded, deposited in D. & W.'s bank account, they were properly reported for tax purposes. He contends that there was insufficient evidence to allow the jury to find that the amounts in question were not accounted for in this manner. We determine, after careful review of the record, that this contention is without merit. There is testimony from which the jury could have found that these receipts were not included in D. & W.'s records of cash receipts and that only amounts which were so included were deposited in the company's bank account. The record also contains ample evidence to support the jury verdict as to the other elements of the offenses charged in the indictment.

We determine, finally, that the District Court's charge to the jury fairly stated the law of the case. Taxpayer failed to make a timely objection to the charge and his contention that it constituted plain error under Rule 52(b), FED R. CRIM. P., is without merit.

The conviction is affirmed.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1271

KENNETH H. DOLLERIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The district court filed no opinion. The opinion of the court of appeals (Pet. 1a–9a) is not yet officially reported.

JURISDICTION

The judgment of the court of appeals (Pet. 1a–9a) was entered on March 20, 1969. The petition was filed on April 16, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner properly preserved his objection to unsolicited testimony of a revenue agent that petitioner's counsel had, during interviews,

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warned him of his rights under the Fifth and Sixth Amendments.

2. Did the evidence warrant a finding that cash petitioner received from the sale of scrap was not reported in his income tax return.

STATEMENT

After a jury trial, petitioner was found guilty on all nineteen counts of an indictment which charged him, variously, with subscribing false income tax returns for himself and his corporation and with filing such returns with intent to evade and defeat the taxes due thereon for fiscal years ending in 1961 through 1965, in violation of Section 7201 and Section 7206 of the Internal Revenue Code of 1954. He was sentenced to a fine of $2,000 and imprisonment of one year and one day on each count, to be served concurrently. (R. 29–37, 403.)

Petitioner had made thirty-six sales of scrap on behalf of D. & W. Sales and Service, Inc., for which he requested and personally received $48,007.50 in cash from the purchasers. In ten of these transactions, part of the purchase price was, at petitioner's direction, paid by checks made out to the corporation, and in other instances of scrap sales the entire purchase price was paid by checks to the corporation. (R. 144, 148, 171–172, 287; Govt. Ex. 32.)

Revenue Agent Morgan testified that the records of the purchasers showed invoices for these sales and weight tickets made out on stationery of the D. & W. corporation. He also testified that while the D. & W. corporate records did reflect the payments received by

check and the weight tickets for such sales, they did not reflect the cash sales or the weight tickets relating thereto, and that such cash sales were not reported by the corporation or petitioner. (R. 246–247, 275–288.)

The accountant who prepared the tax returns (Oldham) testified that he prepared them on the basis of the records of bank deposits and oral statements of petitioner and his employees that all currency had been deposited. In an audit of currency for the thirty-nine month period ending on April 30, 1964, he determined that $13,185 in currency had not been reported in the tax returns. He accepted petitioner's explanation that this had been spent for unrecorded and undocumented company expenses, and Revenue Agent Morgan testified that this $13,185 was not included in his computations of unreported income. (R. 58–78, 88, 108–109, 292.)

When Special Agents of the Internal Revenue Service interviewed petitioner in his office in January and March of 1965, he answered their questions both personally and through his attorney. Thereafter, all answers were given by the attorney, who advised the agents that the missing records were not available, that the proceeds of all scrap sales had been recorded and the cash had been placed in a metal box from which it was removed and deposited when needed or used for deductible expenses. (R. 245–251.)

ARGUMENT

1. There is no merit to the contention (Pet. 9–12) that petitioner was deprived of his privilege not to incriminate himself. Although the petitioner quotes

various portions of the record,[1] his reliance is, as the court of appeals observed (Pet. 2a), essentially on the following testimony of Revenue Agent Morgan (R. 249–250):

> Q. All right. Now, did you meet them on or about October 18th, 1965?
>
> A. Yes. At that time Agent McLellan, Special Agent McLellan, was with me and we met Mr. Dolleris and Mr. Jones in Mr. Dolleris' office at D & W.
>
> Q. And what was the purpose of meeting with them?
>
> A. To discuss the examination.
>
> Q. Did you talk to Mr. Dolleris?
>
> A. Yes. And Mr. Jones advised Mr. Dolleris not to answer questions because they might be used against him. And at that time Agent McLellan stated that under the Constitution Mr. Dolleris had the right to refuse to answer any questions that he thought might incriminate him.
>
> Q. Was anything said about these scrap sales to Brodey & Brodey?
>
> A. Yes. We discussed this—Jones said that scrap sold to Brodey was weighed at D & W and picked up there by a Brodey truck. He said that Dolleris might have helped weigh the scrap and he said that he had the list of transactions which I had given him on March 17th, but he had not determined the cause of the discrepancies.

[1] "R." refers to the transcript of testimony and proceedings certified to this Court.

No objection was made at any time to this testimony in the trial court on the constitutional grounds now argued. By not giving the trial court an opportunity to evaluate his present contentions and to cure any possible prejudice, petitioner waived his objection, *Henry* v. *Mississippi*, 379 U.S. 443, 451 (see Pet. 3a), so that the issue was not properly preserved.

Furthermore, as the court of appeals held (Pet. 3a), this testimony was not elicited by the government. The prosecutor's question was "Did you talk to Mr. Dolleris?" and the answer "Yes" was responsive. The remainder of the answer was volunteered by the witness on a question that was neither objectionable nor objected to. Compare *Boeckenhaupt* v. *United States*, 392 F. 2d 24, 28 (C.A. 4).[2] The trial court, moreover, charged the jury in the usual manner that they should not consider or discuss the defendant's failure to take the stand (R. 399).[3]

2. Contrary to petitioner's contention (Pet. 13–14), the evidence fully warranted a finding that he did not report currency received for certain sales of

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[2] The court of appeals also was warranted in concluding that any possible error was harmless beyond a reasonable doubt. The jury was aware that after petitioner stopped answering questions, his attorney continued to supply factual explanations on his behalf both in and out of petitioner's presence, and his attorney advised the jury that he did this because of his client's right to counsel. (R. 362.)

[3] Petitioner's contention (Pet. 12) that it was erroneous to give this charge because he did not request it has no merit, especially in view of his failure to take any exception to the charge. *Bellard* v. *United States*, 356 F. 2d 437, 439 (C.A. 5), certiorari denied, 385 U.S. 856; *United States* v. *Schwartz*, 398 F. 2d 464, 469 (C.A. 7).

scrap. This contention is based entirely on summaries (R. 333–341) in which petitioner's accounting witness (Button) totalled all the currency deposits he found in the corporation's cash receipts journal and deposit tickets. But the jury was not compelled to conclude that Mr. Button's total of $51,286.51 necessarily includes the $48,007.50 in currency received from scrap sales. The schedules Mr. Button prepared assume that the company kept large amounts of cash on hand for extended periods, although his own auditor (Oldham) testified that he found no cash on hand in preparing certified audits for the period from January 31, 1962 to April 30, 1964. (R. 62–63; defendant's ex. 3–5).

Mr. Button admitted that in totalling the currency deposits he made no attempt to analyze the sources of this currency although he conceded that cash was received by the company from many sources other than sales of scrap. On the other hand, Revenue Agent Morgan testified that he had inspected the company records and analyzed the cash sales, and that his analysis showed sufficient accumulations of currency to account for cash deposits. (R. 245–246, 304–306, 342, 348–349.)

CONCLUSION

The petition should be denied.

Respectfully submitted.

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